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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MELIKE DEWEY,

Plaintiff and Appellant,

v.

LAWRENCE T. HIGGINS,

Defendant and Respondent.

B200661

(Los Angeles County  
Super. Ct. No. BC349817)

APPEAL from an order of the Superior Court of Los Angeles County, Mark V.  
Mooney, Judge. Modified and, as modified, affirmed.

Melike Dewey, in pro. per., for Plaintiff and Appellant.

Lawrence T. Higgins, in pro. per, for Defendant and Respondent.

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Plaintiff and appellant Melike Dewey (Dewey), in propria persona, appeals a judgment confirming an arbitration award in favor of defendant and respondent Lawrence T. Higgins (Higgins).

Dewey contends the trial court erred in confirming the arbitration award, in awarding attorney fees to Higgins, and in declaring her a vexatious litigant,

The order declaring Dewey a vexatious litigant must be modified to delete one of the two bases for declaring Dewey vexatious. In all other respects, the judgment is affirmed.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Higgins was a real estate agent affiliated with Dewey, a real estate broker.

Dewey was the trustor on a deed of trust on certain real property in Blue Jay, California (the Blue Jay property). Higgins was the beneficiary of said deed of trust.

On February 8, 2006, a notice of default was filed on the Blue Jay property.

#### *1. Dewey's first lawsuit against Higgins.*

In March 2006, Dewey filed suit against Higgins in the Los Angeles Superior Court for breach of contract. In that action, Dewey claimed she was owed \$11,250 in broker's compensation in a certain transaction, as well as \$27,800 in lost compensation after a certain property owned by Dominique Reid was taken off the market.

#### *2. Dewey's second lawsuit against Higgins.*

In April 2006, Dewey filed a second lawsuit against Higgins in the San Bernardino Superior Court. This complaint reiterated Dewey's claims for lost commissions on the Reid property, and added a claim against Higgins for wrongful foreclosure of the Blue Jay property.

#### *3. Foreclosure proceedings.*

On May 22, 2006, a notice of trustee's sale was filed on the Blue Jay property.

On July 11, 2006, the San Bernardino Superior Court stayed the foreclosure until proper notice of default was served upon Dewey.

#### *4. Arbitration and related proceedings.*

In November 2006, Dewey and Higgins stipulated to arbitrate both cases.

In an award filed February 20, 2007, the arbitrator found in favor of Higgins on various issues, including the Higgins loan.

On March 9, 2007, Dewey moved to vacate the arbitration award and to vacate foreclosure. Dewey's theory was that Higgins, as the beneficiary of the deed of trust on the Blue Jay property, took an "action" for the recovery of \$60,000 by engaging in the arbitration without a foreclosure of the security, and therefore was barred by the one form of action rule (Code Civ. Proc., § 726)<sup>1</sup> from proceeding with the foreclosure.

The trial court denied the motion to vacate the award and continued the hearing on the motion to vacate foreclosure to April 11, 2007.

On March 20, 2007, the Blue Jay property was sold at a trustee's sale.

On April 11, 2007, the trial court denied the motion to vacate foreclosure.

#### *5. The instant motions.*

On April 23, 2007, Higgins filed a petition to confirm the arbitration award. Higgins concurrently filed a motion for attorney fees and costs, seeking attorney fees pursuant to a contractual fee provision. Higgins also filed a motion to declare Dewey a vexatious litigant.

Dewey filed opposition, including a petition to "correct" the arbitration award to award her \$179,850 and for entry of judgment in conformity with the corrected award.

On June 22, 2007, the matter came on for hearing. The trial court granted Higgins's motion to confirm the award. The trial court ordered Dewey to pay Higgins attorney fees in the sum of \$24,584 as well as \$4,127 in costs. The trial court also granted Higgins's motion to declare Dewey a vexatious litigant, so as to prohibit Dewey from filing any new litigation in California in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed.

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<sup>1</sup> All statutory references are to the Code of Civil Procedures unless otherwise specified.

The order requires Dewey to furnish security in the sum of \$25,000 for the benefit of the moving defendant.

On July 10, 2007, the trial court entered a judgment confirming the arbitration award and awarding attorney fees and costs to Higgins.

On July 10, 2007, the trial court also entered a formal order declaring Dewey a vexatious litigant.

On July 5, 2007, Dewey filed a premature but timely notice of appeal from the judgment. (Cal. Rules of Court, rule 8.104(e).) The notice specifies the trial court's rulings confirming the arbitration award, awarding attorney fees to Higgins and declaring Dewey a vexatious litigant.<sup>2</sup>

### **CONTENTIONS**

Dewey contends the trial court erred in declaring her a vexatious litigant, in confirming the arbitration award, and in awarding attorney fees to Higgins.

### **DISCUSSION**

#### *1. Trial court properly confirmed award in favor of Higgins.*

Section 1286.2, subdivision (a), sets forth limited grounds for vacation of an arbitration award. Those grounds are: “(1) The award was procured by corruption, fraud or other undue means. [¶] (2) There was corruption in any of the arbitrators. [¶] (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator. [¶] (4) *The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.* [¶] (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title. [¶] (6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the

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<sup>2</sup> An order declaring a party a vexatious litigant is not appealable but is reviewable in conjunction with the appeal from the judgment. (*In re Bittaker* (1997) 55 Cal.App.4th 1004, 1008.)

arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision.” (Italics added.)

Although Dewey’s opening brief on appeal argues at length about the arbitration award, the sole statutory ground raised in the brief is section 1286.2, subdivision (a)(4), to wit, “[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.” Dewey asserts the arbitrator exceeded his powers in ruling on the \$60,000 deed of trust because that issue was not submitted for arbitration. The contention fails.

In the San Bernardino case, which was one of the two cases submitted to the arbitrator, Dewey pled a cause of action for wrongful foreclosure. In that cause of action, Dewey alleged Higgins improperly recorded a foreclosure on certain real property “that [Dewey] owns. The deed of trust in the amount of \$60,000.”

Dewey and Higgins stipulated to arbitrate the San Bernardino case, along with the Los Angeles case. The stipulation did not *exclude* any issues from the arbitrator’s purview. Therefore, all issues pled in the San Bernardino action were properly before the arbitrator for resolution. Accordingly, Dewey’s contention the arbitrator exceeded his powers in ruling on the \$60,000 deed of trust is meritless.

*2. No showing of abuse of discretion in trial court’s award of attorney fees to Higgins.*

The agreement between Higgins and Dewey included a provision entitling the prevailing party to reasonable attorney fees and costs “except as provided in paragraph 17.”

Paragraph 17 states in relevant part: “IF ANY PARTY COMMENCES AN ARBITRATION OR COURT ACTION BASED ON A DISPUTE OR CLAIM TO WHICH THIS PARAGRAPH APPLIES *WITHOUT FIRST ATTEMPTING TO RESOLVE THE MATTER THROUGH MEDIATION, THEN IN THE DISCRETION OF THE ARBITRATOR(S) OR JUDGE, THAT PARTY SHALL NOT BE ENTITLED TO RECOVER ATTORNEY’S FEES* EVEN IF THEY WOULD OTHERWISE BE

AVAILABLE TO THAT PARTY IN ANY SUCH ARBITRATION OR COURT ACTION.” (Italics added.)

Dewey contends: “*Since there was never a mediation initiated*, there are no Attorney’s Fees allowed to prevailing party, and therefore Attorney’s Fees in the amount of \$24,584 and cost \$127.55 in Cost [*sic*] were wrongfully granted.” (Italics added.)

The contention lacks merit. Under the plain language of paragraph 17, the failure to initiate mediation is not an absolute bar to a recovery of attorney fees by the prevailing party – rather, a failure to initiate mediation gives the arbitrator or trial court the *discretion* to deny attorney fees to the prevailing party. Dewey has not argued or shown that the trial court abused its discretion in awarding attorney fees to Higgins.

### 3. *The order declaring Dewey a vexatious litigant.*

The trial court declared Dewey a vexatious litigant pursuant to section 391, subdivisions (b)(2) and (b)(3).<sup>3</sup> For the reasons discussed below, Dewey is not a vexatious litigant within the meaning of section 391, subdivision (b)(2); that finding must be stricken from the July 10, 2007 order declaring Dewey a vexatious litigant. However, the trial court properly declared Dewey a vexatious litigant pursuant to section 391,

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<sup>3</sup> Section 391 provides in relevant part: “(b) ‘Vexatious litigant’ means a person who does any of the following: [¶] (1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing. [¶] (2) *After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.* [¶] (3) *In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.* [¶] (4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.”

subdivision (b)(3). Therefore, as modified, the order declaring Dewey a vexatious litigant must be affirmed.

a. *Standard of review.*

“ ‘A court exercises its discretion in determining whether a person is a vexatious litigant. [Citation.] We uphold the court’s ruling if it is supported by substantial evidence. [Citations.] On appeal, we presume the order declaring a litigant vexatious is correct and imply findings necessary to support the judgment.’ [Citation.] Questions of statutory interpretation, however, we review de novo.” (*Holcomb v. U.S. Bank Nat. Assn.* (2005) 129 Cal.App.4th 1494, 1498-1499.)

b. *Dewey does not fall within the meaning of subdivision (b)(2).*

Pursuant to section 391, subdivision (b)(2), a person is a vexatious litigant who, “[a]fter a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.”

Here, section 391, subdivision (b)(2), by its terms, is inapplicable. This litigation, consisting of the Los Angeles and San Bernardino cases, went to arbitration and did not conclude in the trial court until July 10, 2007, at which time the trial court entered a judgment confirming the arbitration award in favor of Higgins. Prior to July 10, 2007, there was no *final* determination in the trial court. Therefore, any motions brought by Dewey were not an attempt to relitigate a final determination in the matter. Accordingly, the July 10, 2007 order, insofar as it declared Dewey a vexatious litigant pursuant to section 391, subdivision (b)(2), is erroneous.

c. Trial court properly declared Dewey a vexatious litigant pursuant to section 391, subdivision (b)(3).

Pursuant to section 391, subdivision (b)(3), a person is a vexatious litigant who, “[i]n any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.” What constitutes “ ‘repeatedly’ and ‘unmeritorious’ under subdivision (b)(3), in any given case, is left to the sound discretion of the trial court. [Citation.]” (*Morton v. Wagner* (2007) 156 Cal.App.4th 963, 971.)

Here, within the span of one month, Dewey initiated two civil actions against Higgins, largely duplicative, one in Los Angeles, the other in San Bernardino. After losing at arbitration, Dewey filed three motions to vacate the arbitration award (one in San Bernardino and two in Los Angeles) which were denied, a request to the arbitrator to have the award corrected (which was denied), and finally a petition to “correct” the arbitration award to award her \$179,850 and for entry of judgment in conformity with the “corrected” award (which petition was denied).

Dewey also filed a third unmeritorious action against Higgins and his attorneys.<sup>4</sup>

On this record, the trial court reasonably could conclude Dewey engaged in unmeritorious filings or tactics that are frivolous or solely intended to cause unnecessary delay. (§ 391, subd. (b)(3).)

Therefore, the order declaring Dewey a vexatious litigant must be affirmed.

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<sup>4</sup> The third action concluded in a judgment of dismissal on August 24, 2007. That judgment was affirmed by this court in *Dewey v. Kim* (October 9, 2008, B201968 [nonpub. opn.]).



### **DISPOSITION**

The July 10, 2007 order declaring Dewey a vexatious litigant pursuant to section 391, subdivisions (b)(2) and (b)(3) is modified to delete the reference to subdivision (b)(2). In all other respects, the judgment is affirmed. Higgins shall recover costs on appeal.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.